No. 92-757

In The Supreme Court of the United States

October Term, 1992

Barbara Landgraf,
Petitioner,

v.

USI Film Products,
Bonar Packaging, Inc., and
Quantum Chemical Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS

David N. Shane *
Baker & Daniels
300 N. Meridian Street
Suite 2700
Indianapolis, IN 46204
(317) 237-0300
Counsel for Respondents

* Counsel of Record

June 25, 1993

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

QUESTION PRESENTED

Does the Civil Rights Act of 1991 apply retroactively to cases pending when the Act became law so as to entitle Petitioner to the redress provided in Section 102 of the Act?

PARENTS AND SUBSIDIARIES

The Respondents were defendants-appellees below. Quantum Chemical Corporation is a Virginia corporation and a publicly traded company. USI Film Products was a manufacturing plant in the USI Division of Quantum. Bonar Packaging, Inc., is a Canadian corporation and purchased the USI Film Products plant from Quantum subsequent to Petitioner's resignation from employment at the plant. Quantum does not have any parent company. Quantum has the following non-wholly-owned subsidiary companies:

Atlantic Energy, Inc.
CUE Insurance Limited
Fallon Propane and Butane Company
Northwest L.P.G. Supply Ltd.
Petrolane Finance Corp.
Petrolane Gas Service L.P.
Petrolane Incorporated
Quantum Petrochemical Corporation Limited

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARENTS AND SUBSIDIARIES	ii
TABLE OF AUTHORITIES	v
STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. SECTION 102 OF THE ACT DOES NOT APPLY TO PENDING CASES	8
A. Retroactivity Is Not Favored In The Law	8
B. Congressional Action Must Meet A Strict Standard In Order To Operate Retrospectively	9
C. The Civil Rights Act of 1991 Does Not Meet The Standard	10
1. The Language Of The Act Does Not Require Retroactivity	10
2. Congress Made A Conscious Choice Demonstrating The Act Does Not Apply To Pending Cases	13
D. The Act Does Not Apply Retroactively	17
II. A PRESUMPTION OF RETROACTIVE APPLICATION OF THE ACT TO PENDING CASES IS UNWARRANTED AND UNSOUND	18
III. EVEN UNDER *BRADLEY* RETROACTIVE APPLICATION CANNOT STAND	24
A. There Is Statutory History To The Contrary	24

TABLE OF CONTENTS—Continued

	Page
B. The Act Creates A New Substantive Liability	25
1. The Act Increases Respondents' Substantive Liabilities	25
2. Prospective Application Is Essential To Permit Employers To Adjust Their Internal Regulation Of Human Conduct	26
3. Section 102 Implicates Both New Substantive Rights And New Substantive Liabilities	28
C. The New Jury Trial Procedure Follows The New Substantive Liability	31
D. Retroactive Application Of The New Substantive Rights And Liabilities And Jury Trial Provisions Would Be Manifestly Unjust	31
IV. PROSPECTIVE APPLICATION WILL PARALLEL THE PROGRESSIVE PATH OF THE LAW	36
CONCLUSION	40

TABLE OF AUTHORITIES

Cases	Page
Bennett v. New Jersey, 470 U.S. 632 (1985)	18, 25, 31
Bohen v. East Chicago, 799 F.2d 1180 (7th Cir. 1986)	3
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)	4, 8, 9, 18, 20
Bradley v. School Board, 416 U.S. 696 (1974)	*passim*
Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)	34
Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)	14-15
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	17
Claridge Apartments Co. v. Commissioner, 323 U.S. 141 (1944)	8
Condit v. United Air Lines, Inc., 631 F.2d 1136 (4th Cir. 1980)	14
Dash v. Van Kleeck, 7 Johns. 477 (1811)	8
Greene v. United States, 376 U.S. 149 (1964)	25, 31
Haddock v. Haddock, 201 U.S. 562 (1906)	25
Jensen v. Gulf Oil Refining & Marketing Co., 623 F.2d 406 (5th Cir. 1980)	14
Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990)	20, 21, 22
Landgraf v. USI Film Products, et al., 968 F.2d 427 (5th Cir. 1992)	4, 5, 26, 27, 32, 34
Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, (7th Cir. 1992) *petition for cert. filed* Dec. 3, 1992	22, 23, 24, 26, 27, 33, 34
Massachusetts v. Morash, 490 U.S. 107 (1989)	12
Miller v. Florida, 482 U.S. 423 (1987)	30
Moore v. Califano, 633 F.2d 727 (6th Cir. 1980)	14
Palmer v. Massachusetts, 308 U.S. 79 (1939)	13
Peak v. United States, 353 U.S. 43 (1957)	10
Reynolds v. M'Arthur, 27 U.S. (2 Pet.) 417 (1829)	9
Schwab v. Doyle, 258 U.S. 529 (1922)	12-13
Sikora v. American Can Co., 622 F.2d 1116 (3rd Cir. 1980)	14
Stender v. Lucky Stores, Inc., 780 F. Supp. 1302 (N.D. Cal. 1992)	19

TABLE OF AUTHORITIES—Continued

	Page
Thorpe v. Housing Auth., 393 U.S. 268 (1969)	*passim*
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)	15
Union Pacific R.R. v. Laramie Stock Yards Co., 231 U.S. 190 (1913)	9-10, 17, 18, 30
United States v. Burke, —— U.S. ——, 112 S.Ct. 1867 (1992)	28, 29, 30, 31, 36
United States v. Heth, 1 U.S. (3 Cranch) 399 (1806)	9, 10, 12, 13
United States v. Security Indus. Bank, 459 U.S. 70 (1982)	18, 19, 25, 31
United States v. St. Louis, S. F. & T. R.R., 270 U.S. 1 (1926)	9
United States v. Wurts, 303 U.S. 414 (1938)	11
United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co., 209 U.S. 306 (1908)	9, 12, 13
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	27, 34
Weaver v. Graham, 450 U.S. 24 (1981)	30, 33
Wiener v. Farm Credit Bank of St. Louis, 759 F. Supp. 510 (E.D. Ark. 1991)	19

Statutes

Americans With Disabilities Act of 1990	
42 U.S.C. § 12101	11
42 U.S.C. § 12111	11
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991)	1
Section 2, 105 Stat. 1071	36
Section 102, 105 Stat. 1072	*passim*
Section 108, 105 Stat. 1075	12
Section 109(c), 105 Stat. 1077	11, 12
Section 110, 105 Stat. 1078	12
Section 402(a), 105 Stat. 1099	10, 11, 12, 13, 16
Section 402(b), 105 Stat. 1099	11, 12
Title VII of the Civil Rights Act of 1964	
42 U.S.C. § 2000e *et seq.*	2, 7

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 2000e-5(g)	3, 4
42 U.S.C. § 2000e-5(f)(4)	31
Pub. L. No. 92-161, 86 Stat. 103 (1972)	13, 14
Pub. L. No. 95-555, 96 Stat. 2076 (1978)	14

Legislative History

136 Cong. Rec. S16418-19 (Oct. 22, 1990)	15
S. 2104, 101st Cong., 2d Sess. § 15(a)(4) (1990)	15

Other Authorities

90 4th Fed. Prac. Digest (1992)	19

Miscellaneous

Benjamin N. Cardozo, *The Growth of the Law* (Yale University Press) (1924)	21
O.W. Holmes, *The Path of the Law*, 10 Harvard Law Review 457 (1897)	28
Sir Thomas More, *Utopia*, bk. 2, 105 (E.P. Dutton & Co., Inc.) (1915) (1516)	21
Story, J., *Commentaries on the Constitution* (1873)	8, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
Petitioner,

v.

USI FILM PRODUCTS,
BONAR PACKAGING, INC., and
QUANTUM CHEMICAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS

STATUTE INVOLVED

The case involves the Civil Rights Act of 1991 ("the Act" or "1991 Act"), Publ. L. No. 102-166, 105 Stat. 1071 (1991). (Appendix B to Petition For Certiorari) The specific provision at issue in this case is Section 102 of the Act.

STATEMENT OF THE CASE

While working for the USI Film Products plant in Tyler, Texas, Barbara Landgraf ("Landgraf" or "Petitioner") was subjected to sexual harassment by a fellow employee, John Williams. (Joint Appendix ("Jt.App.") 9, ¶ I.1) When Landgraf notified her immediate super-

visor, Bobby Martin, about the harassment, he did not respond. (Jt.App. 9, ¶ I.2,3) Landgraf reported the harassment to Sam Forsgard, who handled personnel matters at USI. He investigated immediately. (Jt.App. 9-10, ¶ 4, 5) Williams was given the plant's most serious form of written reprimand and transferred to another department in order to reduce his contact with Landgraf. (Jt. App. 9-10, ¶ 6; 22) Landgraf was told to notify Forsgard if Williams continued to bother her; she reported no such incidents to USI. (Jt.App. 21-22) The plant's remedial measures alleviated the harassment Landgraf had been subjected to by her co-worker Williams. (Jt.App. 10, ¶ 6)

Landgraf resigned in January 1986, a few days after the plant instituted its remedial measures. (Jt.App. 10, ¶ 7) Her letter of resignation made no reference to Williams or the harassment. (Jt.App. 2)

Later in 1986, Landgraf filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, because of Williams' harassment and her resignation, which she attributed to the plant's discriminatory work environment. (Jt.App. 3-4) The EEOC subsequently issued a determination finding that her co-worker Williams had sexually harassed her; that after Landgraf had reported the harassment, the plant transferred Williams and issued him written discipline, so that "Respondent provided remedy on its own initiative" (Jt.App. 4); and that Landgraf resigned "because she was unable to get along with other co-workers." (Jt.App. 5) The determination found that "no additional relief is necessary" because "Respondent undertook prompt remedial action," and that her resignation was not a constructive discharge. (Jt.App. 5) The determination was issued September 15, 1988.

Landgraf brought suit under Title VII in the United States District Court for the Eastern District of Texas.

She also sought relief under pendent state law claims, which were dismissed as untimely. (Jt.App. 13, ¶ 8) The matter was tried to the court. In its findings of fact, conclusions of law and judgment (Jt.App. 9-14), the district court found that Landgraf was subjected to sexual harassment by Williams, her fellow employee, by which she suffered mental anguish; that when she reported it to Forsgard he "immediately conducted an appropriate investigation" and responded; that "[t]he remedial measures instituted by Forsgard alleviated the harassment;" that "at the time Landgraf resigned from her job, USI had taken steps . . . to eliminate the hostile working environment arising from the sexual harassment;" and that Landgraf was motivated to resign by her conflicts and unpleasant relationships with co-workers generally. (Jt.App. 9-10, ¶¶ I.1, 10, 5, 6, II.6) As a matter of law, the district court found that her resignation was not a constructive discharge (Jt.App. 11, ¶ II.6) and that Landgraf was not entitled to any damages remedy under 42 U.S.C. § 2000e-5(g), quoting from *Bohen v. East Chicago*, 799 F.2d 1180, 1184 (7th Cir. 1986):

> "[N]o damages are available under Title VII. If Congress wishes to amend the provisions of Title VII to provide a remedy of damages, it can do so. Until then, this court may only enforce the statute as written, and as currently written Title VII does not contemplate damages."

(Jt.App. 12, ¶ 7) Judgment was entered May 22, 1991. (Jt.App. 14)

Landgraf appealed. After briefing on the appeal was completed, and while the appeal was pending oral argument, the Civil Rights Act of 1991 was enacted on November 21, 1991.

On February 6, 1992, Landgraf's counsel sent a letter to the court of appeals, stating in pertinent part:

> Recent amendments to Title VII, 42 U.S.C. § 2000e et seq., contained in the Civil Rights Act of

> 1991 may bear on the issues before the Court in the above referenced matter. The Civil Rights Act of 1991 has become law since the briefs of the parties were filed.
>
> Please bring this matter to the Court's attention.

(Jt.App. 17-18)

Following oral argument, the court of appeals affirmed the district court's decision. (Jt.App. 19-28) *Landgraf v. USI Film Products, et al.*, 968 F.2d 427 (5th Cir. 1992). The court rejected Landgraf's claim of constructive discharge, noting:

> Although USI's investigation of this incident may not have been overly sensitive to Landgraf's state of mind, the company had taken steps to alleviate the situation and told Landgraf to let them know of any further problems. A reasonable employee would not have felt compelled to resign immediately following the institution of measures which the district court found to be reasonably calculated to stop the harassment.

(Jt.App. 23-24) The court also rejected her claim for damages, because "[w]e have consistently interpreted [42 U.S.C. § 2000e-5(g)] to mean that 'only equitable relief is available under Title VII' " and "damages . . . are legal, not equitable relief. . . ." (Jt.App. 25)

The court below found that Section 102 of the Civil Rights Act of 1991, providing for compensatory and punitive damages, with right of jury trial, did not apply retroactively. Finding "no clear congressional intent on the general issue of the Act's application to pending cases," the court turned to legal principles involving retroactivity. Recognizing that such principles were "somewhat uncertain" in light of *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), and *Bradley v. School Board*, 416 U.S. 696 (1974), the court, applying the *Bradley* standard *arguendo*, held that the provisions of Section 102 "should not be applied retroactively to this case." (Jt.App. 26-27)

The court rejected retroactive application of the jury trial provisions: "We are not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial. . . . To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources." (Jt.App. 27)

The court found similarly for the compensatory and punitive damage provisions of Section 102:

> Retroactive application of this provision to conduct occurring before the Act would result in a manifest injustice. . . . Unlike allowing prevailing plaintiffs to recover attorneys' fees as in *Bradley*, the amended damage provisions of the Act are a seachange in employer liability for Title VII violations. . . .
>
> . . . There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself. It would be an injustice within the meaning of *Bradley* to charge individual employers with anticipating this change in damages available under Title VII. . . . [They] impose 'an additional or unforeseeable obligation' contrary to the well-settled law before the amendments.

(Jt.App. 27-28)

SUMMARY OF THE ARGUMENT

The law does not favor retroactivity. Statutes are presumed to apply only prospectively to human conduct, unless Congress provides to the contrary using words that are clear, strong and imperative, of unequivocal and inflexible import, manifestly evidencing a Congressional intent for retroactive application and requiring that result.

The Civil Rights Act of 1991 does not satisfy the standard for retroactive application. Its language does not provide for retroactive application, and efforts to

draw negative inferences from its provisions are both erroneous and insufficient to establish the necessary manifest intention. Its legislative drafting path demonstrates an intentional Congressional choice against retroactivity, and its legislative history either supports prospective application or is at worst of no value in divining legislative intent.

Petitioner's use of *Bradley* and *Thorpe v. Housing Auth.*, 393 U.S. 268 (1969), to attempt to reverse the ancient principle disfavoring retroactive legislation, by using those cases to call for a presumption in favor of retroactivity, leads to unjust and unwise results and should not be countenanced. The use of *Bradley* and *Thorpe* by litigants and the resulting confusion in the lower courts should be brought to a halt by a reaffirmation of the principle that absent clear Congressional direction to the contrary, statutes regulating human conduct have only prospective operation. To the extent that they are inconsistent with that fundamental principle of jurisprudence, *Bradley* and *Thorpe* should be disapproved.

Even applying the *Bradley* analysis *arguendo*, the provisions of Section 102 of the 1991 Act should not be applied retroactively. Their creation as part of the Act and its effective date provisions evidenced a legislative choice against retroactivity. They add a tort-like cause of action to Title VII, which previously provided only for restitutionary, equitable relief; as such, they affect substantive rights and liabilities. And their retroactive application to human conduct and trials occurring before their enactment would create manifest injustice.

Prospective application, recognizing a new right to different damages flowing from Congress' new conception of injury to be redressed by Title VII, will advance the Congressional purposes of the 1991 Act by providing new regulation of human conduct.

ARGUMENT [1]

Petitioner asks the Court to find that the new punitive damage, compensatory damage and related jury trial provisions of Section 102 of the Act apply retroactively to her case because it was pending appeal when the Act was passed. Her cause below addressed human actions that occurred in the winter of 1985-1986; was filed in court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in 1989 (with no claim under Title VII for compensatory or punitive damages or jury trial); [2] was tried in February 1991; and was on appeal pending decision when the Act became law in November 1991. Petitioner asks the Court to hold that Section 102 should be applied retroactively, in order that she now might make a new claim of injury under Title VII for which she seeks compensatory and punitive damages, determined by a jury, based on those human actions that occurred before, and were tried before, the Act became law. Her request should fail, because Section 102 of the Act does not and should not apply retroactively to pending cases involving human conduct or trials occurring before the Act's effective date.

---

[1] In its Brief, Roadway Express, Inc., Respondent in *Rivers v. Roadway Express, Inc.*, No. 92-938, has addressed exhaustively various issues common to these consolidated cases. In order not to burden the Court with redundant argument, Respondents in this case join in Roadway's Brief and will not repeat here the arguments made there, which are incorporated herein by reference.

[2] Petitioner sought no compensatory or punitive damages or other legal relief under Title VII. Petitioner sought equitable relief under Title VII and compensatory and punitive damages under pendent state common law claims. At trial, Petitioner conceded that her state common law claims were barred by the applicable statute of limitations, and the district court dismissed those claims with prejudice. (Jt. App. 13, ¶ 8)

I. SECTION 102 OF THE ACT DOES NOT APPLY TO PENDING CASES

A. Retroactivity Is Not Favored In The Law

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 208. "Retroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944). The principle is not new. It finds expression in ancient texts, English common law, Constitutional doctrine (the test of due process, the ex post facto and bill of attainder prohibitions), this Court's rules of statutory construction, and simple fairness.

The non-retroactivity principle is a fundamental tenet of American jurisprudence. In the criminal sphere of the law, the principle is embodied in a flat constitutional prohibition of ex post facto laws. In the civil area, the non-retroactivity principle antedates the Constitution itself:

> It is a principle in the English law, as ancient as the law itself, that a statute, even of its omnipotent Parliament, is not to have a retrospective effect.

Dash v. Van Kleeck, 7 Johns. 477, 503 (1811). The non-retroactivity principle is embodied in the ancient maxim *Nova Constitutio Futuris Formam Imponere Debet, Et Non Praeteritis* ("a new state of the law ought to affect the future, not the past"). It is a principle that has been embraced by the greatest scholars in our legal history, *e.g.*, Story, J., *Commentaries on the Constitution § 1398* (1873) ("retrospective laws are . . . generally unjust, and . . . neither accord with sound legislation nor with the fundamental principles of the social compact.").

It is a principle that has been taken for granted by the distinguished members of this Court for generation upon generation. Chief Justice Marshall declared:

> It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable. No words are found in the act of 1818, which render this odious construction indispensable.

Reynolds v. M'Arthur, 27 U.S. (2 Pet.) 417, 434 (1829). A century later, Justice Brandeis, writing for the Court, observed:

> That a statute shall not be given retroactive effect, unless such construction is required by explicit language or by necessary implication, is a rule of general application.

United States v. St. Louis, S. F. & T. R.R., 270 U.S. 1, 3 (1926).

B. Congressional Action Must Meet A Strict Standard In Order To Operate Retrospectively

Given the principle disfavoring retroactivity, there is a standard which legislation by Congress must meet in order to operate retrospectively. "[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language *requires* this result." *Bowen*, 488 U.S. at 208 (emphasis added). A statute "ought never to receive such a [retroactive] construction *if it is susceptible of any other*." *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) (emphasis added). Rather, "[w]ords used in a statute ought not to have a retrospective operation, unless they are so *clear, strong and imperative*, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States v. Heth*, 1 U.S. (3 Cranch) 399, 413 (1806) (emphasis added). Therefore, "a retrospective operation will not be given to a statute which interferes with antecedent rights or *by which human action is regulated*, unless such be the '*unequivocal and inflexible im-*

port of the terms, and the *manifest intention* of the legislature.'" *Union Pacific R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (emphasis added) (quoting *Heth*, at 413).

C. The Civil Rights Act of 1991 Does Not Meet The Standard

The Civil Rights Act of 1991, including the new jury trial and compensatory and punitive damage provisions of Section 102, does not satisfy this standard. Its language does not require such a result; it is susceptible of other construction. Its words are not clear, strong and imperative; other meanings can be annexed to them. The import of its terms are not unequivocal and inflexible; and the intentions of its enacting Congress are anything but manifest.

1. *The Language Of The Act Does Not Require Retroactivity*

Section 402(a) speaks to the "Effective Date" of the Act. It states: "Except as otherwise specifically provided this Act and the amendments made by this Act shall take effect upon enactment." Enactment occurred on November 21, 1991.[3]

This language certainly does not require retroactivity. The words are not so "clear, strong and imperative" as to apply the Act retroactively; the words do not speak to retroactivity at all. They are not "unequivocal and inflexible" in compelling the application of the Act retroactively to the facts of a pending case, the human action of which occurred years before the Act; the words do not speak to pending cases at all. On their face, the

[3] Read in common sense terms, the Act and its amendments would take effect to regulate human conduct that occurs on or after November 21, 1991, not before. "That seems to us to be the common sense of the matter; and common sense often makes good law." *Peak v. United States*, 353 U.S. 43, 46 (1957).

words of Section 402(a) of the Act stated by Congress to establish its effect say nothing at all about pending cases or retroactivity. The reader cannot find a requirement of retroactivity in its words.

Unable to draw comfort from the language of Section 402(a), Petitioner attempts to draw negative inferences from its language and legislative history. Neither leads to a conclusion of retroactive application: [4]

- The qualifying language of Section 402(a)—"Except as otherwise specifically provided"—has a purpose. Sections 102(a)(2) and (3) of the Act, 42 U.S.C. §§ 1981a(2) and (3), addressed intentional discrimination under the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* Section 108 of the ADA, 42 U.S.C. § 12111, "otherwise specifically provided" that the employment provisions of the ADA did not become effective until July 26, 1992, well after the enactment of the Civil Rights Act of 1991. Absent the qualifying language of Section 402(a), the damages provisions of Section 102(a)(2) and (3) of the 1991 Civil Rights Act would have been effective before the ADA itself. That would be absurd.[5]

- Petitioner argues that Section 109(c) (coverage of expatriates) and Section 402(b) (effectively, the *Ward's Cove* litigation) are prospective, so that the rest of the Act must be applied retroactively. It is not so. They are isolated pieces of the statute: one originated in a version of the bill which was expressly retroactive; the other was a late amendment whose proponents made clear its presence was not in derogation of the prospective effect

[4] See the Brief of Roadway Express, Inc., pp. 16-24.

[5] *Cf. United States v. Wurts*, 303 U.S. 414, 418 (1938) ("It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued").

of the Act. They both survived into the final statute as insurance policies for specific situations. Both sections are susceptible of other construction and can have other meanings annexed to them. *United States Fidelity & Guaranty Co.*, 209 U.S. at 314; *Heth*, 1 U.S. (3 Cranch) at 413.[6]

• The Act is redundant already (Section 110(b) needlessly restates Section 402(a)). Section 402(b) and Section 109(c) easily can be interpreted as having a purpose to be redundant for emphasis. *Massachusetts v. Morash*, 490 U.S. 107, 113 n.9 (1989) ("Congress was not concerned with duplication").

Properly read and interpreted, the Act is prospective; it does not apply to pending cases. But even assuming *arguendo* that the Act can be read to have two meanings, the principle that retroactivity is not favored argues that the meaning which rejects retroactivity must be applied:

> The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. . . . If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases, that which rejects retroactive application must be selected.

Schwab v. Doyle, 258 U.S. 529, 534-35 (1922).

[6] Petitioner (Pet. Br. at 10, n.7) argues that Section 108(n)(2)(A) and (B) also demonstrate retroactive operation of the Act. The argument is tortured, and it fails. Section 108 looks prospectively, to reduce challenges to litigated or consent judgments or orders that are being implemented through employment practices. Subsection (2)(A) preserves standards of intervention when such a judgment or order is challenged; subsection (2)(B) protects the rights of certain parties to the proceeding in the event of such a challenge. Both are rationally applicable prospectively, to keep a court from interpreting subsections (1)(A) and (B), which limit such challenges, to affect either legitimate intervenors or certain parties to the order or judgment itself. Petitioner's out of context use of the language shows the depth of negative inference to which she must go to seek (unsuccessfully) a suggestion of retroactivity. And her argument ironically ignores the motive of Section 108, "facilitating prompt and orderly resolution" of proceedings, a goal that retroactive application of the Act most assuredly would frustrate.

> laration leaves to the statute a double sense, it is the command of the cases, that which rejects retroactive application must be selected.

Schwab v. Doyle, 258 U.S. 529, 534-35 (1922).

Where the reader seeks a "clear, strong and imperative" and "unequivocal and inflexible" statement of retroactivity, use of negative inference does not suffice:

> And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendos of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.

Palmer v. Massachusetts, 308 U.S. 79, 83 (1939). Where, as here, analysis of the asserted interpretation demonstrates other explanations, it is all the clearer that retroactive application is precluded. Where, as here, "other meaning[s] can be annexed" to the words of the statute alleged to create retroactivity, *Heth*, 1 U.S. (3 Cranch) at 413, prospective application is further reinforced. The possibility of an inferred construction does not suffice to satisfy the standard to create retrospective application. A statute "ought never to receive such a [retroactive] construction if it is susceptible of any other." *United States Fidelity & Guaranty Co.*, 209 U.S. at 314.

2. *Congress Made A Conscious Choice Demonstrating The Act Does Not Apply To Pending Cases*

In selecting the language of Section 402(a), Congress had choices. It was amending Title VII, the history of which provided at least two relevant options.

In amending Title VII in 1972, Congress specifically expressed, in language that is clear, strong, imperative, unequivocal and inflexible, that certain of the amendments applied to cases then pending. Specifically, Section 14 of

those amendments, Public Law No. 92-261, 86 Stat. 103, 113 (1972), stated:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges *pending with the Commission on the date of enactment of this Act* and all charges filed thereafter.

(Emphasis added.)

In amending Title VII in 1978, Congress took a different course. Section 2(a) of Public Law No. 95-555, 92 Stat. 2076 (1978), provided an effective date as follows:

> Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment.

By the time Congress addressed a new civil rights act in 1990 and 1991, the courts had interpreted language of the same sort as Congress used in 1978—and used again in the 1991 Act—to be prospective in operation, *i.e.*, they had found that legislative use of the phrase "shall be effective on the date of enactment" does not create any retroactive application to pending cases. *See, e.g., Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1139-40 (4th Cir. 1980) (so interpreting the 1978 amendments to Title VII). *See also, Jensen v. Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 410 (5th Cir. 1980); *Sikora v. American Can Co.*, 622 F.2d 1116, 1123-24 (3rd Cir. 1980). *Cf., Moore v. Califano*, 633 F.2d 727, 732-33 (6th Cir. 1980) (finding that in using "just a general provision"—"The provisions of this Act shall take effect on the date of enactment of this Act . . ."—"Congress thus failed to make any specific provision for retroactive application of the amendments to cases pending on appeal before the courts.") Congress is presumed to know of prior judicial interpretations of its statutory language when it uses similar language at a later time. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-99 (1979).

Congress used language to amend Title VII in 1972 which demonstrates it knows how to write statutes which apply to pending cases. Congress used language to amend Title VII in 1978 which demonstrates it knows how to write statutes which do not apply to pending cases, and the courts confirmed that conclusion. *Cf., Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) ("Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly.").

The difference in language was not lost on Congress in its effort to pass a new civil rights act. When it drafted initial versions of what became the Civil Rights Act of 1990, Congress used language modeled after the 1972 amendments. For example, the 1990 version of the act contained provisions expressly addressing pending cases, one of which made the amendment expanding recognized injuries and possible damages under Title VII expressly applicable to pending cases. Section 15(a)(4) of that act provided:

> Section . . . 8 [expanding damages under Title VII to include compensatory and punitive damages] . . . *shall apply to all proceedings pending on or commenced after the date of enactment* of this Act.

S. 2104, 101st Cong., 2d Sess. § 15(a)(4) (1990) (Senate version of the 1990 Civil Rights Act) (emphasis added). The language is clear, unequivocal, and inflexible. It might have been unconstitutional, but it otherwise would have met the standard for retroactive application.

But the language did not survive. The act was vetoed by President Bush. 136 Cong. Rec. S16418-19 (Oct. 22, 1990). That veto put a focus on retroactivity, because one of the President's reasons for vetoing the legislation was the "unfair" rules it contained about retroactivity. *Id.*

Congress tried again in 1991, using similar language. But before legislation was enacted in 1991, Congress backed off the language that would have applied the amendments to pending cases. Instead, Congress substituted in Section 402(a) the language that made the amendments effective upon enactment, language previously interpreted to be only prospective in operation.

Congress' choice was clear. Its intent is revealed by the path it chose to develop language that would become law. The statute's drafting path moves away from Congress' prior clear language establishing retroactive application to pending cases and toward Congress' prior language interpreted to confirm prospective application. Congress not only is presumed to know the difference between the two choices; the history of the 1991 Act shows Congress did know the difference.

Not only is language requiring retroactivity absent, but it is manifestly *intentionally* absent. Retroactivity language was contained in prior versions of the bill, but it was eliminated as a part of the legislative compromise that led to the enactment of the 1991 amendments.[7] Petitioners "are now waging in a judicial forum a specific

[7] Petitioner cannot find comfort in examination of the Administration's proposal (Pet. Brief, p. 19). The language that made its way into the statute as enacted came from Senator Danforth's proposal, which parroted language previously used by Congress in amending Title VII, and interpreted by the courts, to be prospective in its operation. See Roadway's Brief in No. 92-938, pp. 20-23. The Administration's proposal was not the source of the legislation. Even ignoring that fact, the proposal is internally consistent: one sentence of the Administration's proposal is prospective, by prior Congressional usage and judicial interpretation ("This Act and the amendments made by this Act shall take effect upon enactment"); the other is non-retroactive ("The amendments made by this Act shall not apply to any claim arising before the effective date of this Act"). The Administration's proposal thus called once for prospective application and once against retroactive application. That the legislation ultimately enacted only called once for prospective application does not make it retroactive.

policy battle which they ultimately lost" in the Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864 (1984). Congress could not muster adequate support to apply the amendments to pending cases; it could muster adequate support to make the amendments prospective. That is most compelling evidence of legislative intent. As part of the legislative bargain to achieve new law, the operation of the 1991 Civil Rights Act is prospective.

D. The Act Does Not Apply Retroactively

Congress chose away from language to apply the Act retroactively to pending cases. It chose toward language interpreted to apply the Act only prospectively. Its language provisions support that result. Its legislative history does not negate it.[8] It is only by attempting, erroneously, to derive meaning by "fashioning a mosaic" out of "the innuendos of disjointed bits of a statute" or snippets of legislative dialogue that even a negative inference of retroactivity can be postulated. That is not the stuff of which the retrospective editing of the regulation of human conduct and the resulting rights, obligations and liabilities should be made.

The principle that retroactive regulation of human conduct is not favored demands not an inconclusive approach to retroactivity but a clear statement of it. When a statute is alleged to apply retrospectively, the search is for "the unequivocal and inflexible import of

[8] As noted in detail in Roadway's Brief in No. 92-938, pp. 22-23, the history of legislative debate supports prospective application and does not compel retroactive application. At worst, the legislative history reflects a draw in the last minute war of words. Even Petitioner, focusing on the statements of individual legislators, concludes that the comments of legislators are inconclusive. (Petitioner's Brief, p. 14 and n.12) The key is this: neither legislative debate nor various midnight maneuverings by individual legislators restored the language Congress previously had used, and earlier had tried but failed to use here, to apply a statute amending Title VII retroactively to pending cases.

the terms, and the manifest intention of the legislature." *Union Pacific R.R.*, 231 U.S. at 199. The terms of the 1991 Act and their history do not provide an "unequivocal and inflexible import" for retroactivity; an (at worst) inconclusive legislative dialogue does not evidence the necessary "manifest intention of the legislature." *Id.* Lacking these, retroactivity—not favored by the law—should not result.

II. A PRESUMPTION OF RETROACTIVE APPLICATION OF THE ACT TO PENDING CASES IS UNWARRANTED AND UNSOUND

Petitioner relies upon *Bradley*, 416 U.S. at 711-12 (1974) ("a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary") to argue for a presumption that Section 102 should be applied retroactively because it came on the books while her case was pending. *See also, Thorpe*, 393 U.S. at 281-82 (1969). Before addressing this case assuming *Bradley/Thorpe arguendo*, Respondents respectfully submit that history has shown that current efforts to apply *Bradley/Thorpe* have created too much confusion and disarray in the law. Their twig cannot be grafted onto *Bowen*'s tree. The Court should use this opportunity to stop their misdirected growth.

Bradley and its progenitor *Thorpe* are unto themselves. Before, and since, the Court has articulated the principle that retroactivity is not favored and has sought "language [that] requires this [retroactive] result." *Bowen*, at 208. *See also, United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) ("statutes operate only prospectively").

The Court already has attempted to limit the scope of *Bradley* and *Thorpe*. In *Bennett v. New Jersey*, 470 U.S. 632 (1985), which issued after both *Bradley* and *Thorpe*, the Court noted that Bradley's self-limitation "comports with another venerable rule of statutory interpretation,

i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Id.*, at 639-40.

Yet the experience of the lower courts in trying to deal with the ambiguities of discretion created by a seeming choice between the recent *Bradley/Thorpe* approach (which Petitioner interprets to mean statutes are presumed retroactive) and the long-standing principle just reaffirmed in *Bowen* (which confirms statutes are presumed prospective) demonstrates the need for a clear restatement of the rule. Petitioner's own catalogue (Petition in 92-757, pp. E-1 to E-27, listing more than 250 cases on the 1991 Act) reflects the vast amount of judicial time and energy spent on the issue in the context of this one statute alone. What could and should be simple and clear as a default rule, permitting the lower courts to move on to the merits of justice, is instead a cauldron of confusion that has suspended and delayed the advance of the law.[9]

A critical element of the confusion is demonstrated by Petitioners' use of *Bradley* as a jumping off point in these consolidated cases. The use is expansive—it effectively would reverse the principle that the law disfavors retroactivity. If *Bradley* means what Petitioner contends—that the phrase "apply the law in effect at the time it renders its decision" means a new statute presumptively

---

[9] What may have been obvious to law students—"[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student," *United States v. Security Indus. Bank*, 459 at 79 (1982)—is no longer so to lawyers. *Cf., for example*, 90 4th Fed. Digest at p. 188 (1992):

> E.D. Ark. 1991. There is a strong presumption against retroactivity of statutes. *Wiener v. Farm Credit Bank of St. Louis*, 759 F. Supp. 510 [*aff'd*, 975 F.2d 1350 (8th Cir. 1992)].
>
> N.D. Cal. 1992. Presumption exists in favor of retroactive application of statutes, . . . *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302.

applies to human conduct and trials that preceded it—then the presumption against retroactivity of laws regulating human conduct becomes a presumption in favor of retroactivity, and *Bowen* and 200 years of principle are cut down to die.

Justice Scalia has noted the many reasons for the Court to reaffirm the "clear rule" that "absent specific indication to the contrary, the operation of nonpenal legislation is prospective only." *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 841 (1990) (Scalia, J., concurring). After reciting examples demonstrating that the presumption against retroactive application of statutes is both ancient and sacred in the law, and explaining the derivation of the *Thorpe* and *Bradley* results, Justice Scalia gets to the heart of the matter:

> It is significant that not a single one of the earlier cases cited in *Thorpe* and *Bradley*—except, of course, the cases dealing with judicial decisions rather than statutes and the case dealing with repeal of a criminal statute—even purports to be applying a presumption of retroactivity. They purport to be following the express command of the statute, or not to be acting retroactively at all.

Id., at 850. This recognition, buttressed by lengthy exposition and recitation of the cases themselves, *id.*, at 848-53, isolates the problem with *Thorpe* and *Bradley*: their verbiage unintentionally created fallow ground, and counsel for litigants subsequently have planted the seed of expansive misreading of their scope and effect, by using the wrong "point of departure" in the analysis of prospective or retroactive application. *Id.*, at 858. *Bradley* and *Thorpe* did not expressly address or reverse the historical presumption against retroactive application of statutes regulating human conduct. But they have been interpreted as doing just that.

Justice Scalia's words in 1990 were prescient in one aspect, to be sure:

> The *Thorpe-Bradley* presumption of retroactivity, which is arguably formulated to apply to a relatively narrow class of cases but which logically must be extended across-the-board, misleads prospective litigants and confuses judges of the lower courts.

Id. The hundreds of cases cited in the Petition For Certiorari here are vivid testimony to that misleading and confusing effect. And what has happened here can, and likely will, be repeated for other statutes enacted by Congress in other contexts. Once the seeds are on the wind, they will land and grow.

There are other reasons for pulling the weed that is growing from *Bradley-Thorpe.* The first is that it is impractical in the realm of regulation of human conduct. A presumption of retroactivity is a presumption that human actions may be given consequences that did not exist, and thus were not known, when the actions occurred. This not only would reverse the principle of non-retroactivity; it would strike both the heart of the universal purpose of the law, to guide conduct, and the notions of fairness and justice on which such guidance is based. If laws are to "be made and published only to the intent that by them every man should be put in remembrance of his duty," Sir Thomas More, *Utopia,* bk. 2 105 (E.P. Dutton & Co., Inc.) (1955) (1516), then "[l]aw as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." Benjamin N. Cardozo, *The Growth of the Law* (Yale University Press) (1924), p. 3. Because they change the consequences of actions taken before their existence to guide conduct, "retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact." Story, J., *Commentaries On The Constitution* § 1398 (1873). Yet Petitioner's use of *Bradley-Thorpe* would make all such laws presumptively retroactive to regulate human conduct.

The second reason for discarding further judicial use of a presumption of retroactivity is that it forces the courts into the realm of policy. *Bradley* itself recognizes the need for escape from presumption and invokes the concept of "manifest injustice." The presumption of retroactivity has that effect, to be sure. (See *infra*, pp. 31-35). The concept may be soothing in theory, but it is wrenching in practice. It pulls the courts onto very soft ground, where the result of their thinking can and does "expand or contract the effect of legislative action" across time. *Bonjorno*, 494 U.S. at 857 (Scalia, J., concurring). If "manifest injustice" is not ascertained by the court, human conduct long since past and tried may be revived and new consequences attached to it; if "manifest injustice" is ascertained, the human conduct and its trial may remain in repose. And what determines "manifest injustice"? This is adequately unclear. As Justice Scalia explains, "[a] rule of law, designed to give statutes the effect Congress intended, has thus been transformed to a rule of discretion, . . . " *Id.* By what that discretion would be fettered, if at all, is unstated and unknown. Individual courts, motivated by "mercy, or compassion, or social utility, or whatever other policy motivation might make one favor a particular result," must attempt to "judge action on the basis of a legal rule that was not even in effect when the action was taken." *Id.* Legislation by Congress ("should we make this conduct subject to that rule, or not?") becomes legislation by the court ("should I make this conduct subject to that rule, or not?"). The temptations lead away from predictable justice.

Third, Congress itself needs some restraint. Its power to create law is "awesome." *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 228 (7th Cir. 1992), *petition for cert. filed* (Dec. 3, 1992). Its ability to create substantive rights and obligations is an exercise of the public will, withhout any concern for "incremental change." *Id.*

Congress needs no justification to depart from current statutes that serve to guide conduct, and it has no "tradition of modesty." *Id.* Beyond the Constitution, Congress' power to affect the lives and fortunes of the citizens of the country and the companies that provide them work knows few restraints. One can overexercise power. Congress is not harmed, and faith in its processes and prescriptions is aided, if "this power is held a little in check by the presumption that its handiwork is to be applied only to future conduct." *Id.*

Fourth, the use of a presumption of retroactivity inflicts a terrible price upon judicial administration. It is effectively a one-two punch. Congress can be, and often has been, silent as to retroactivity when enacting a statute regulating human conduct. Under the "presumption" of retroactivity asserted under *Bradley/Thorpe*, courts must —in virtually every case brought under such a statute— ascertain whether that silence works a manifest injustice. The burden is worsened if, as is logical, manifest injustice is separately determined in the context of each individual case brought under the statute. As each of these separate decisions is rendered (the results may be inconsistent), the burden passes to courts of appeal, who must attempt to reconcile them or distinguish them on the facts of individual cases. The matrix of permutations and combinations of results—under each statute, and then under them all collectively— would pound on the minds of jurists, pushing them away from the merits of justice and into the discretionary interstices of a whole new jurisprudence of "manifest injustice." And then, while the federal judiciary staggers under this new burden, the second body blow comes: for those cases where "manifest injustice" is not found, the courts would have to reach back to rewrite the obligations and consequences, the rights and liabilities, which would (unknowingly, because retroactively) guide the human conduct of the parties to cases and adjust their results, retrospectively. *See, e.g., Luddington*, 966 F.2d at 299 ("Retroactive application

across the board would produce massive dislocations in ongoing litigation . . . [and] engender enormous satellite litigation and associated uncertainty to fix an indistinct boundary"). The impracticality of such an approach is obvious.

The manner of containing the problem is not difficult. It requires only a confirmation that, when a court applies a law in effect at the time of its decision, it must still apply the sacred principle of statutes regulating human conduct—they are not to be applied retrospectively unless Congress manifests such an intention clearly and unequivocally. A court's first recognition may be to ascertain what laws are in effect when it reaches its decision, but its second recognition must be not to apply a law to human conduct which has preceded the effective date of the statute, unless Congress clearly has so provided.

Litigants' misuse and judges' confusion over *Bradley* and *Thorpe* in the context of human conduct have created an aberrant growth that should be cut clean while it is still young. The clear rule reaffirmed in *Bowen* should stand.

III. EVEN UNDER *BRADLEY* RETROACTIVE APPLICATION CANNOT STAND

Even assuming *arguendo* that *Bradley* is used as a point of departure, Petitioner's reliance on it here is misplaced.

A. There Is Statutory History To The Contrary

As noted, *supra* at pp. 13-17, when Congress' drafting path and choices, and the resulting language of the effective provisions of the statute, as interpreted by the courts, properly are considered, they lead to a conclusion of prospective operation. That same analysis rejects the *Bradley* presumption. There is statutory history to the contrary. *Bradley*, 416 U.S. at 711-12.

B. The Act Creates A New Substantive Liability

Under *Bennett*, 470 U.S. at 639-40, "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *See also United States v. Security Indus. Bank*, 459 U.S. at 79 (1982); *Greene v. United States*, 376 U.S. 149, 160 (1964). In *Bennett*, 470 U.S. at 640, the Court recognized that *Bradley* itself noted that its statutory change "did not affect substantive obligations." Section 102 clearly affects Petitioner's substantive rights and Respondents' substantive obligations and liabilities.

1. *The Act Increases Respondents' Substantive Liabilities*

There can be no doubt that the addition of compensatory and punitive damages affected—expanded by up to $300,000 per claim—employers' "substantive liabilities" under Title VII. That such an increase in potential liability derived from a statute whose clear purpose is to regulate human conduct impacts that conduct. As such, it affects both substantive liabilities and substantive obligations.[10] The impact on liabilities is obvious: The potential damage claim has increased from actual lost wages and other restitutionary relief to that relief plus (for large employers) up to an additional $300,000.[11]

---

[10] As noted below, the increase in the degree of financial liability is driven by a recognition of new tort-like personal injuries and legal damages to compensate for them. But even were the $300,000 increase solely one of degree, it would still create and impose new liability. As Justice Holmes explained:

> I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it.

Haddock v. Haddock, 201 U.S. 562, 631 (1906) (Holmes, J., dissenting).

[11] Petitioner's disingenuous approach aids and abets her faulty logic. She does not address a simple question: if one person seeks

2. *Prospective Application Is Essential To Permit Employers To Adjust Their Internal Regulation Of Human Conduct*

As the court of appeals noted below:

> the amended damage provisions of the Act are a seachange in employer liability for Title VII violations.
>
> . . . There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself.

Landgraf, 968 F.2d at 433. *See also, Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 229:

> [Changes in remedies] can have as profound an impact on behavior outside the courtroom as avowedly substantive changes. . . . The new statute . . . subjects employers to greater liabilities.
>
> . . . The amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change. That is the philosophy behind the ex post facto clause and also behind the interpretive

to obtain money from another person, how can that not be substantive? Petitioner wants to hide under labels. She wants to leverage the labels with inferences from the legislative perspective. What she does not want to do, because it would bring the effect of her claim out into the open, is look at what will happen if she prevails here. What will happen is she will have a new claim for money today, based on an injury first recognized under Title VII in 1991 ("mental anguish"), that she did not have when she was employed, when she quit, when she filed her charge and her lawsuit, when she tried her lawsuit and lost it, or when she appealed it. That new claim for money is substantive. However Petitioner would label it, the Act, if applied retroactively, would have an effect on her substantive rights (they might be worth more) and on Respondents' substantive liabilities (they might increase).

> principle that presumes that a new civil statute applies only to conduct that occurs after its effective date.

This is especially true where the human conduct being regulated occurs at many levels of the respondent employer's operation. The case here is illustrative. The human conduct that the court below found caused Petitioner some "mental anguish" was "sexual harassment," "the source of which was a fellow employee named John Williams." (Jt.App. 9, ¶ 1, 10, ¶ 10) The employer did not commit the harassment; Petitioner's fellow employee did. Neither was a supervisor. The theory of substantive liability for the harassment that Petitioner espouses against Respondents is thus derivative and based on respondeat superior.

Such a claim of vicarious liability makes all the more important that employers have the opportunity to train and counsel their supervision and plant management in how to respond. That effort, and the resources committed to it, is affected by the source and degree of liability involved. *Landgraf*, 968 F.2d at 433; *Luddington*, 966 F.2d at 229. For Respondents to be subjected retroactively to materially increased exposure for human conduct it did not commit patently increases its substantive liabilities. *Cf., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18) (1976) (noting a hesitancy "to approve the retrospective imposition of liability on any theory of deterrence").[12]

[12] Petitioner invokes Holmes' "bad man" (Pet. Br. at 31) to suggest employers will assume a vested right to discriminate and act with impunity absent retroactive application of the Act. The reference is loud but inaccurate and illogical.

First, the facts here disprove the assumption. Three separate reviews, by the EEOC, the district court and the court of appeals, found that the efforts of USI eliminated the hostile working environment. The employer took steps to stop the harassment, without any recognition of tort-like injuries or availability of legal damages, and thus neither the agency nor the courts had any recognized

3. *Section 102 Implicates Both New Substantive Rights And New Substantive Liabilities*

Petitioner deals with Section 102 as if all it does is increase the price to be paid by an employer for discrimination. That is not so. The provisions of Section 102 do much more. They add a new cause of action, premised upon injuries not even recognized under Title VII as it existed from 1964 until late 1991, for which new remedies are available.

This Court recognized the impact of the provisions of Section 102 in *United States v. Burke*, —— U.S. ——, 112 S.Ct. 1867 (1992). Writing last term, but addressing Title VII as it existed prior to the amendments made

---

injury left to remedy under Title VII. If there are "bad men" out there hypothetically, USI was not one.

Second, Petitioner cites Holmes' use of a hypothetical "bad man" without learning the lesson Holmes was trying to teach. He saw the law as a prospective means to guide the conduct of people based not on intrinsic morality but on their ability to predict consequences of different courses of action. For Holmes, the "bad man" proved the need to know what the consequences of human actions would be: "[I]f we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the . . . courts are likely to do in fact. I am much of his mind." Holmes, *The Path Of The Law*, 10 Harvard Law Review 457, 460-61 (1897). Statutes are one means: "It is to make the prophecies easier to be remembered and to be understood . . . that statutes are passed in a general form." *Id.*, at 458. And the purpose of such laws remains to guide conduct, to let people know "under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves." *Id.*, at 457. Deterrence of human conduct by avoidance of risk and liability is Holmes' method of the law, "to advise people in such a way as to keep them out of court." *Id.* He is four-square with the principle against retroactive application of laws regulating human conduct: What has already occurred cannot be deterred, and liability inflicted beyond that forewarned by law when the conduct occurs is not only unjust but inhibits people's acceptance and use of the law as a deterring prophecy. Retroactive recognition of injuries and imposition of liabilities blocks the path of the law as a guide to human conduct.

by the Civil Rights Act of 1991, the Court recognized that before 1991 Title VII "does not allow for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions, and other equitable relief." *Id.*, at 1873.[13] Therefore, "the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes, as well." *Id.* And the source of the limited focus was Congress itself:

> Notwithstanding a common-law tradition of broad tort damages and the existence of other federal antidiscrimination statutes offering similarly broad remedies, Congress declined to recompense Title VII plaintiffs for anything beyond the wages properly due them. . . . Thus, we cannot say that a statute such as Title VII, whose sole remedial focus is the award of backwages, redresses a tort-like personal injury. . . .

Id. at 1874. The substantive rights for plaintiffs under Title VII before the enactment of the Civil Rights Act of 1991 did not include the right to damages for tort-like personal injuries; Title VII neither recognized nor remedied tort-like personal injuries.[14] And the substantive lia-

---

[13] Here, such relief was not necessary below because, as the EEOC, district court and court of appeals all recognized, USI had undertaken the relief itself. Jt. App. 5 (EEOC) ("since [USI] undertook prompt remedial action, the Commission, accordingly, deems that no additional relief is necessary"); Jt. App. 11 (district court) ("USI had taken steps . . . to eliminate the hostile working environment arising from the sexual harassment"); Jt. App. 26 (court of appeals) (Landgraf challenged, but did not prevail on, "the propriety of USI's reaction to the harassment").

[14] Title VII as it existed until November 1991 says nothing of personal injuries. It was not until the 1991 Act that Title VII's coverage extended to the injuries described in Section 102(b)(3): "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."

bilities for defendants under Title VII before the enactment of the Civil Rights Act of 1991 did not include the obligation to pay damages for such injuries. Title VII as it then existed provided no such cause of action.

The Court, writing after the enactment of the 1991 amendments from the Act, made clear that these substantive matters changed with the 1991 Act but that the Court was not prepared to transport them retroactively back to the consequences of human actions at times before the 1991 Act:

> Under the Civil Rights Act of 1991, victims of intentional discrimination are entitled to a jury trial, at which they may recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages. See Pub. L. 102-66, 105 Stat. 1073. . . . [W]e believe that *Congress' decision to permit jury trials and compensatory and punitive damages under the amended act signals a marked change in its conception of the injury redressable by Title VII, and cannot be imported back into analysis of the statute as it existed at the time of this lawsuit.*

Id., at 1874, n.12 (emphasis added).

If a substantively retroactive law is one that creates "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed," *Union Pacific R.R.*, 231 U.S. at 199, or one that "changes the legal consequences of acts completed before its effective date," *Miller v. Florida*, 482 U.S. 423, 431 (1987), *quoting Weaver v. Graham*, 450 U.S. 24, 31 (1981), then the compensatory and punitive damage provisions of Section 102 certainly are substantive in how they would affect Respondents retroactively. Its provisions are a "marked change" and they "cannot be imported back into analysis of the statute as it existed at the time of this lawsuit." *Burke*, 112 S.Ct., at 1874,

n.12. Even assuming *Bradley*, no presumption of retroactive application of Section 102 applies, because Section 102 "affect[s] substantive rights and liabilities [and thus is] presumed to have only prospective effect." *Bennett*, 470 U.S. at 639-40; *Security Indus. Bank*, 459 U.S. at 79; *Greene v. United States*, 376 U.S. at 160.

C. The New Jury Trial Procedure Follows The New Substantive Liability

Before the Civil Rights Act of 1991, Title VII cases were tried to the court. 42 U.S.C. § 2000e-5(f)(4). Section 102(c) changes that, by providing:

> If a complaining party seeks compensatory or punitive damages under this section [102, which did not exist until 1991]—
>
> (1) any party may demand a trial by jury; and
>
> (2) the court shall not inform the jury of the limitations described in subsection (b)(3).

This language makes clear that the new right to a jury trial is dependent upon the availability of the new compensatory or punitive damages. The jury trial of Section 102(c) is thus linked to the substantive liability of Section 102(a). Because the substantive liability precludes retroactive application, the jury trial, having no independent purpose, is precluded as well.

D. Retroactive Application Of The New Substantive Rights And Liabilities And Jury Trial Provisions Would Be Manifestly Unjust

Ignoring *arguendo* the aberrational injection of *Bradley* and *Thorpe* into the realm of regulation of human conduct; ignoring *arguendo* the substantive rights and liabilities expanded and thus affected by Section 102; and assuming *arguendo* the retroactive application of Section 102's punitive and cmpensatory damage provisions, via jury trial, to Respondents here, such an application is "manifestly unjust." There are many reasons.

To begin, for a defendant to receive and respond to allegations, to defend them at trial, to be put to an appeal, to have it be fully briefed, and then to have the whole process be derailed and recycled by a communication from Petitioner's counsel to the court, ultimately seeking ex post facto a new proceeding with expanded liability from a new trier of fact, unfairly upsets the justice already dispensed. In layman's terms, it wasn't over when it should have been. The ad hoc growth of a new proceeding would produce a windfall for the Petitioner. Justice is not well-dispensed from a merry-go-round. *See Landgraf,* 968 F.2d at 432-33, rejecting the notion of a remand for a jury trial:

> We are not persuaded that Congress intended to upset cases whichc were properly tried under the law at the time of trial. [citing *Bennett*] To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources.

Second, the proceeding would have to examine all over again the facts of Petitioner's claim, which would be a clear waste of precious judicial time and energy, or would have to bind Respondents to the litigation tactics and judgments they made in a proceeding in which matters such as punitive damages and compensatory damages were not at issue and in which the trier of fact was an experienced Federal judge, not a jury. There are many aspects of any judicial proceeding—from the understanding of the law at the time to the strategic judgments of offers of evidence to the nuances of stipulations—that may change dramatically if the plaintiff's state of mind is a source of potential injury and damages; if the trier can add punishment to remedy; if the trier of fact is jury, not judge; and so on. The injustice—a version of "bait and switch"—is manifest.

Third, the result would be freakish and arbitrary. Employers whose employees engaged in conduct in the mid-

1980s similar to that involved here would be left free in history, without retroactive application of Section 102 to that conduct, while Respondents here would be retroactively bound to respond to Section 102 as if it had been in effect when such human conduct occurred. The selective rewriting of history that would be occasioned by a retroactive application of Section 102 would not impact employees and employers evenly, nor with a just hand. Some would have the rights and liabilities established by their proceedings touched not a whit; others, like Respondents here, would watch the records in their proceedings no longer be worth the paper they are printed on. An extra-record letter from counsel to the court at the tail end of an appeal is an odd, unusual and unjust means to distinguish among employers and employees to see which suddenly have new rights and liabilities and which do not.

Fourth, Congress made no distinction between punitive and compensatory damages in Section 102. The $300,000 cap applies collectively. The notion that an employer may be punished—subjected to punitive damages—in an ex post facto proceeding, based on human conduct that occurred before the possible punishment was even known, would be unjust beyond quarrel. *See, e.g., Luddington,* 966 F.2d 225, 227-28 (1992):

> The idea that the law should confine its prohibitions and regulations to future conduct, so that the persons subject to the law can conform their conduct to it and thus avoid being punished, whether criminally or civilly, for conduct that they had no reason to think unlawful, is a component of the traditional conception of the "rule of law." . . . [C]onformity to it is the right policy for courts to follow in default of other guidance.

Cf., Weaver v. Graham, 450 U.S. 24, 28 (1981) (" '[t]he enhancement of a . . . penalty . . . seems to come within the same mischief as the creation of a . . . penalty after

the fact' ") (quoting *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 397 (1798) (Paterson, J.)).

Fifth, the employers involved would have had no opportunity to measure the risk of their conduct. A potential $300,000 swing in exposure will have a deterrent effect. Indeed, that is precisely what Congress recognized. *See* Section 2(1) of the Act: "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." There is an obvious discrepancy between a statutory purpose to deter conduct and a retroactive application of a substantive liability provision to human conduct that occurred six years ago. *Cf., Usery v. Turner Elkhorn Mining Co.,* 428 U.S. at 17-18 (expressing the Court's hesitancy "to approve the retrospective imposition of liability on any theory of deterrence"). It is impossible to deter conduct that has already occurred.

The corollary of deterrence is an opportunity to avoid the penalty imposed for the violation. For employers such as Respondents here to be subjected to the penalty withhout the opportunity to avoid it would be manifestly unjust. *See, e.g., Landgraf,* 968 F.2d at 433:

> It would be an injustice . . . to charge individual employers with anticipating this change in damages available under Title VII. . . . [C]ompensatory and punitive damages impose 'an additional or unforeseen obligation' contrary to the well-settled law before the amendments. [quoting *Bradley,* 416 U.S. at 721].

See also Luddington, 966 F.2d at 229 ("such changes [in damages] can have as profound an impact on behavior outside the courtroom as avowedly substantive changes").

Finally, the discretion provided to courts to implement the concept of "manifest injustice" in the context of substantive rights and liabilities itself would be unjust. The context is a loophole, a sea of discretion. The substantive rights and liabilities created by Title VII alone cover

virtually the full spectrum of employment decisions, with plaintiffs of both sexes and every race, religion, national origin and other protected criteria. At any given point in time, their proceedings are at stages across the entire gamut from charge to appeal. The resulting matrix of possibilities against which to create new claims and proceedings is virtually infinite. And there would be nothing save the words "manifest injustice" to guide the courts. The resulting proliferation of rulings, all subject to appeal, can hardly be expected to have that degree of uniformity and predictability which tells the litigants involved they have been treated fairly.

What Petitioner seeks here is a rule that would rewrite the substantive effects of history, by allowing a plaintiff retroactively to create and expand substantive legal relief, and thus retroactively to impose on a defendant new and expanded substantive legal liability, unknown to the defendant in the exercise of its obligations and unavailable to the plaintiff in the pursuit of her rights at the time when the relevant human actions occurred, using a proceeding not even created until long after the conduct giving rise to the dispute occurred and well after the dispute had been tried. That is manifestly unjust.[15]

---

[15] In an era where the rights of the individual are expanding by increased Congressional regulation of "human action," there will always be individuals whose "human actions" fall on the "before" rather than the "after" side of the line when Congress creates a new substantive right and imposes a new substantive liability. It is a natural instinct for such individuals to act in their own self-interest, seek to remake history, and drag the benefits of the future into the past. Lawyers may enjoy this exercise, but few others will. The courts risk loss of precious time and energy. The Congress risks judicial discretion that undercuts or overrides legislative intent. The humans whose actions are regulated will lose the ability to look to positive law as a guide to their conduct, for fear next year's enactments will be applied backwards in time and shake their reliance upon the law like leaves from a tree in the wind. The result is that in the name of equality the quality of law, justice and life risks being degraded for all.

IV. PROSPECTIVE APPLICATION WILL PARALLEL THE PROGRESSIVE PATH OF THE LAW

It is quite evident that there is no basis to find retroactive application of Section 102 to pending cases involving human conduct and trials that occurred prior to the enactment of the 1991 Act. What Congress did, and how Congress did it, simply defeats any claim of retrospective operation of the Act. And why Congress did what it did does not compel retroactive operation either. To the contrary, the purposes of the 1991 Congress enacting its Civil Rights Act through the compromises it reached comport entirely with a prospective operation of the statute.

Congress' findings that gave rise to the Act asserted the need for both deterrence and additional protections against discrimination. *See* Section 2(1) ("additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace") and 2(3) ("legislation is necessary to provide additional protections against unlawful discrimination in employment"). These are entirely consistent with prospective application. The new regulations of human conduct, injuries and remedies created by the Act will serve to provide "additional protections" against discrimination in the future and "additional remedies" when it does occur; and they will serve to "deter" the conduct and its results made actionable by the Act. As this Court has noted, Congress' supporting reports recognized the need to acknowledge new injuries and provide new compensatory and punitive damages for them via Section 102. *Burke,* 112 S.Ct. at 1874, n.12. Congress' purposes will be served with prospective application of Section 102.

In the regulation of human conduct, at the federal level, it is the actions of Congress that move the law forward. In 1991, a new Congress determined to expand recognized injuries under Title VII (to include those

"tort-like" injuries identified in Section 102(b)(3)) and to create new liabilities under Title VII (to include compensatory and punitive damages) to recompense individuals who suffer such injuries and file claims based on them. What the 1991 Congress did to create these expanded rights and liabilities based on the human conduct regulated by Title VII in 1991 should be applied, prospectively.

The presumption against retroactivity of laws regulating human conduct has its basis in fundamental notions of substantial justice and fair play. Its application in the American system of government both reflects and reinforces basic attributes of our democratic institutions. The legislative process is not static; rather, it is a dynamic process in which shifting coalitions of interest groups forge coalitions, make compromises, and ultimately forge, through the legislative struggle, an act of Congress. This process repeats itself each session of Congress—there is not but one Congress, rather a series of Congresses, each of which is entitled to respect as the legislative representatives of the people at any given point in time.

The law that was in effect at the time that the facts of this lawsuit occurred, at the time that this lawsuit was instituted, and at the time that this lawsuit was tried, represented a compromise of conflicting interests by a Congress that intended such human conduct to be governed by a law that it had passed. That Congress, under basic principles of American public law, could not bind future Congresses and prohibit them from ever altering that law, and the balance of interests that it represented. But just as an earlier Congress cannot bind a future Congress, a future Congress should not be presumed to undo the work of earlier Congresses absent explicit statutory language, particularly in the realm of regulation of human conduct.

Explicit statutory language exists regarding the law applicable to this case—the conduct occurred after the

effective date of the Civil Rights Act of 1964, as amended in 1972 and 1978, and those Congresses intended that this conduct be governed by the substantive rules and liabilities that had been enacted. Under those substantive rules, USI was found by the EEOC, the district court and the court of appeals to have responded properly and in a manner that alleviated the harassment being caused by Petitioner's fellow employee, so that neither injunctive nor declaratory relief was warranted. Under those substantive rules, there was no recognition under Title VII of Petitioner's mental anguish caused by her fellow employee as an injury, nor any provision of legal damages under Title VII to compensate her for it. Absent explicit statutory language erasing the positive law created by the earlier Congresses, there is no basis for applying a different rule of law to this case. To do so would be a usurpation of the legislative authority possessed by the Eighty-Eighth Congress that enacted the Civil Rights Act of 1964, and the Ninety-Second and Ninety-Fifth Congresses that amended it in 1972 and 1978.

Under the Petitioner's view of the law, there would be no finality to litigation. The dynamic legislative process, which in some respect or another is constantly changing, would necessitate reconsideration of a myriad of decisions in lawsuits at all stages of development, simply because Congress has not spoken clearly to the question of retroactivity. This position would destroy the wisdom handed down over the generations by the illustrious members of this Court—that the principle of non-retroactivity of laws regulating human conduct has been held sacred in the United States, and that clear language from Congress is required before a court will adopt the "odious construction" of making a statute retroactive.[16]

---

[16] There is a visionary purpose to the Court's historical principle that "retroactivity is not favored in the law"—to keep the creation of law at a time separate from and prior to the application of it, so that the "policy preferences" of the legislature may not be created at the same time (or even after) the courts reward or punish the conduct to which the preferences are applied. A presumption that Congress at least will let citizens know—in "clear, strong and imperative" language of "unequivocal and flexible import"—when it would rewrite the effects of history that cannot be recovered from the past helps them have faith in Congress and the courts as a guide to their conduct in the future. It is fundamental to the rule of law.

The retroactive application of the 1991 amendments to this case would erase the legislative compromise that earlier Congresses deemed appropriate to govern the human conduct that occurred in this case. That position flies in the face of centuries of jurisprudence, sound principles of American government, the realities of the legislative process, and fundamental notions of substantial justice and fair play.

The progressive path of the law is served societally with a prospective application of the statute. The new injuries are now recognized, and the new damages on which they are based are now available under all statutes addressed by Section 102. Employers are now on notice of the increased liabilities that may accrue, and those increased liabilities serve to motivate increased employer vigilance against harassment and intentional discrimination, creating the deterrent effect Congress desires. Should human actions nevertheless be imperfect, the new injuries Congress recognized and the new damages Congress provided for them in the 1991 Act are now available. Congress' purposes are served.

CONCLUSION

The judgment of the Court of Appeals holding that the Civil Rights Act of 1991 did not retroactively apply to this case should be affirmed.

Respectfully submitted,

DAVID N. SHANE *
BAKER & DANIELS
300 N. Meridian Street
Suite 2700
Indianapolis, IN 46204
(317) 237-0300
Counsel for Respondents

June 25, 1993

* Counsel of Record